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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-636

FRANK W. COKER and REGINA COKER

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

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Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Frank W. and Regina Coker, husband and wife, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 14, 1973.

Opinions Below

The findings of fact and opinion of the Tax Court (Appendix A, *infra*, pp. 9-15) are reported at 31 T.C.M. 317. The opinion of the Court of Appeals (Appendix B, *infra*, pp. 16-18) is reported at 480 F.2d 146, 31 AFTR 2d 73-1323.

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1973. The time for filing this petition for a writ of certiorari has been extended by Order of Mr. Justice Thurgood Marshall to and including October 11, 1973 (Appendix C, *infra*, p. 19). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether, from all the dollars earned and received by petitioner Frank W. Coker in carrying on his trade or business, all expenses paid or incurred by petitioner in driving between his residence and job site and in driving at the job site are deductible under Section 162(a) of the Internal Revenue Code, without constitutionally valid statutory proscription, in order to reduce petitioner's *gross receipts* down to what may be taxed as petitioner's *income* under the Internal Revenue Code and the Sixteenth Amendment to the Constitution of the United States.

Statutes Involved

INTERNAL REVENUE CODE OF 1954

Section 162. TRADE OR BUSINESS EXPENSES.

(a) In General. — There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business

Section 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

CONSTITUTION OF THE UNITED STATES

16th AMENDMENT. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Statement of the Case

During the year 1966, Frank W. Coker ("Frank") was the carpenter shop steward at a construction site in Stony Brook, New York, which site covered two large tracts (eight to ten miles apart) where between 500 and 600 single family dwellings were constructed in 1966.

Frank's duties included: blowing the whistle to start and stop work; deciding when weather was unfit to work in; checking carpenter's union cards; keeping time records; procuring union cards where necessary from the district council office; keeping records of each carpenter's time for his welfare, pension and vacation benefits; checking the union's time records against the contractor's records; taking injured carpenters to the hospital; insuring that contractors observed the terms of the union contract; and doing carpentry work as time permitted, thus necessitating the presence of his carpentry tools at all times. In connection with his duties, Frank was required to transport in his 1964 Oldsmobile approximately 200 pounds of tools a total of 16,182 miles in 1966 to and from the job site daily in the same 1964 Oldsmobile required for performing his duties on the job site. In the course of performing his duties, Frank contacted at least once and sometimes two or three times each day more than 80 carpenters employed at this job site. To reach these men spread over two large tracts, Frank was required to travel at least 60 miles per day on the job site and vicinity in the same 1964 Oldsmobile containing the 200 pounds of tools, driving an additional total of 15,660 miles in 1966 in connection with his duties.

Every one of the 31,842 miles driven by Frank in his 1964 Oldsmobile was a business necessity to enable Frank to perform the services required to earn and acquire dollars in his trade or business. Of this total mileage, the Tax Court allowed as ordinary and necessary trade or business expenses under Section 162(a) of the Internal Revenue

Code all of Frank's expenses of driving 15,660 miles on the job site. Of the remaining required 16,182 miles, the Tax Court held one-third of the expenses of these required 16,182 miles to be deductible as ordinary and necessary trade or business expenses under Section 162(a) of the Internal Revenue Code and the remaining two-thirds of the expenses of these required 16,182 miles to be personal, non-deductible, commuting expenses under Section 262 of the Internal Revenue Code.

Petitioner's total expense of driving to, on and from the job site was $2,678.94. The Tax Court allowed as a deduction $1,923.78 or 71.811239% of the $2,678.94 total.

The Commissioner and petitioners appealed the Tax Court's decision. The Court of Appeals for the Second Circuit affirmed the Tax Court, thus leaving the Commissioner and the petitioners with no resolution of the dispute over the deductibility of Frank Coker's business expenses.

Upon order and permission of the Second Circuit, the Commissioner and petitioners filed *out-of-time* petitions for rehearing of the Second Circuit's affirmance of the Tax Court decision. As of the early part of October 1973, the Second Circuit has made no ruling on either of the *out-of-time* petitions for rehearing and the Commissioner and petitioners still have no resolution of the dispute over the deductibility of Frank Coker's business expenses.

By an Order signed by Mr. Justice Thurgood Marshall on July 31, 1973 (Appendix C, *infra*, p. 19), the time for filing this petition for a writ of certiorari was extended to and including October 11, 1973.

Reasons for Granting the Writ

1. Both the Commissioner and the petitioners appealed the Tax Court decision herein and are in agreement that the Tax Court decision in this case, which has been affirmed by the Court of Appeals below, is erroneous.

2. Both the Commissioner and the petitioners filed *out-of-time* petitions for rehearing of the Second Circuit's affirmance of the Tax Court decision herein and are in agreement that the Second Circuit's affirmance of the Tax Court's decision is erroneous.

3. The Commissioner at the Court of Appeals did not controvert petitioner's detailed analysis on brief showing that:

a. A tax on Frank W. Coker's gross receipts from his trade or business is unconstitutional as violative of the 16th Amendment to the Constitution of the United States which grants Congress power to lay a tax on *incomes* — as distinguished from *receipts.*

b. Section 262 of the Internal Revenue Code is unconstitutionally vague and indefinite. Further, that Section 262 is a result largely of inertia rather than necessity. 4A Mertens, Law of Federal Income Taxation, sec. 25.17, fn. 66. Section 262 has a *con*junctive head, a *dis*junctive body, and no definitions whatever. We cannot read Section 262 as including anything. We cannot read Section 262 as excluding anything. Section 262 is undefined triple-talk.

c. There is no valid American commuting rule. That the commuting rule is entirely confined to the British Isles and may not be imported and imposed on Americans so long as the United States Constitution and its 16th Amendment remain as a barrier and safeguard against alien concepts of government and taxation. That the basic error lies in relying on British tax law and cases: *Revell* v. *Directors, etc.,* 3 Gr. Brit. Tax Cases 12 (1890); *Cook* v. *Knott,* 2 Gr. Brit. Tax Cases 246 (1887); *Lothian* v. *Macrae,* 22 Scot. Law Rptr. 219 (1884)—see *Gilberg* v. *Commissioner* (Appendix A *infra*, p. 13), 55 T.C. 611 (1971) at page 616.

d. Frank Coker's necessary implements in carrying on his trade or business were his 1964 Oldsmobile and his inseparable 200 pounds of carpenter tools. Frank would not go to work without the carpenter tools. Frank would not drive to work without the 1964 Oldsmobile containing the required carpenter tools. In viewing Frank Coker's total work patterns and requirements, it is an impossible concept that Frank would or could have driven to work in his 1964 Oldsmobile if the 1964 Oldsmobile with the inseparable carpenter tools was not moved from his driveway during the year 1966; such a concept is entirely irrational.

e. No part of Frank's driving expenses can be labeled personal, non-deductible, commuting expense under Section 262 of the Internal Revenue Code for reasons already given and for one additional reason. Even if we could pretend that Section 262 was not unconstitutionally vague and indefinite, there is a rule in tax law that Section 262 "personal" expenses should be limited to those which are not acquisitive in character from an income-producing point of view. *Primuth* v. *Commissioner,* 54 T.C. 374, 381. It is undisputed that all Frank's driving expenses were acquisitive in character from an income-producing point of view. The Tax Court stated the fact forcefully that Frank Coker "was *required* to transport approximately 200 pounds of tools to and from the job site daily in his 1964 Oldsmobile." (Appendix A, *infra,* p. 10)

4. Although the Second Circuit cited *Commissioner* v. *Flowers,* 326 U.S. 465, 469 (1946) for the proposition that commuting expenses have been "*considered*" non-deductible personal expenses (Appendix B, *infra,* p. 18), the Second Circuit nevertheless impliedly overruled or disagreed with the Supreme Court majority opinion in *Commissioner* v. *Flowers, supra,* by allowing as a deduction part of petitioner's business expenses away from the job site—thus

causing an apparent conflict with the prior decision of the Supreme Court in *Commissioner* v. *Flowers, supra.* Perhaps the *Flowers* decision should be reviewed, clarified or modified by this Court. Perhaps the Second Circuit is in error in citing the *Flowers* decision for the proposition that commuting expenses have been *"considered"* non-deductible personal expenses. Perhaps the *Flowers* decision was not unanimous. And perhaps the *Flowers* decision is incompatible with the United States Constitution. In a recent decision of this Supreme Court (*Fausner* v. *Commissioner of Internal Revenue,* Supreme Court, No. 72-1396. Decided June 25, 1973. *Petition For Rehearing filed* July 20, 1973), this Court pointedly declined to cite the *Flowers* case as having anything to do with commuting expenses although urged to do so by the Commissioner on page 2 of his *Fausner* Memorandum to this Court on Fausner's petition for certiorari. The *Fausner* case was decided without briefs or oral argument and this Court restricted its holding in the *Fausner* case to the peculiar Fausner facts and assertions that something "indivisible" could be "apportioned". Although the Fausner facts and assertions are diametrically different from this Coker case, we are encouraged that this Court recognizes the enormity of the problem facing the lower courts.

Courts of Appeals deal with substantially similar situations, attach different labels to them, discuss different sections of the Internal Revenue Code, discuss no sections of the Internal Revenue Code, make guesses as to which direction is up, and create different answers to tax questions which should all have the same answer. For instance:

In *Crowther* v. *Commissioner,* 269 F.2d 292 (C.A. 9), the Ninth Circuit allowed 100% of Crowther's automobile expenses of going to work.

In *Donnelly* v. *Commissioner,* 262 F.2d 411 (C.A. 2), *affirming* 28 T.C. 1278, the Second Circuit affirmed a Tax Court total disallowance of Donnelly's expense of going to work.

In *Tyne* v. *Commissioner*, 385 F.2d 40 (C.A. 7), *after remand*, 409 F.2d 485 (C.A. 7), *certiorari denied*, 396 U.S. 833, *on remand*, 29 T.C.M. 1398, *affirmed*, 468 F.2d 913 (C.A. 7), the Seventh Circuit affirmed a 50% allowance of Tyne's automobile expenses of going to work.

A viable solution to the question presented is possible and desirable in the administration of the Federal Tax Laws.

Pot-luck is now the rule in the lower Courts. No reasoned direction is being provided the truly massive numbers of people who travel to work in this nation.

Since the adoption of the 16th Amendment to the Constitution in 1913 and the enactment of the Income Tax Act of 1913, no definitive ruling has been made by the Supreme Court on the Constitutional questions here presented.

There is a mathematically accurate formula available to substitute for the diversity of lower Court estimates of business expense allowances which would substitute certainty for uncertainty and assist the Internal Revenue Service and the lower courts which decide questions of federal tax law.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for oral argument.

Respectfully submitted,

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Attorney for Petitioners

October, 1973.

Appendix A

T. C. Memo. 1972-80

UNITED STATES TAX COURT

FRANK W. and REGINA COKER, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 4163-70 SC. Filed March 30, 1972.

Thomas J. Carley, for the petitioners.
Fred L. Baker, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

SACKS, *Commissioner*: Respondent determined a deficiency of $286.71 in petitioners' Federal income taxes for the year 1966. Since petitioners do not contest certain adjustments made in the statutory notice of deficiency only two issues are presented for our determination. The first issue involves the deductibility of all or any part of certain transportation expenses under section 162(a), Internal Revenue Code of 1954[1] incurred by petitioner Frank W. Coker while traveling between his personal residence and job site. The second issue is affirmatively pleaded by petitioners and involves the question of whether petitioners are entitled to a refund of all taxes paid for 1966 because respondent "elected to work without the statutory formula set out in section 63 and that statutory formula is not now available to respondent."

1 All statutory references herein are to the Internal Revenue Code of 1954, as amended, unless otherwise specified.

Appendix A

FINDINGS OF FACT

Some of the facts have been stipulated by the parties and are found accordingly.

Petitioners Frank W. Coker (hereinafter referred to as petitioner) and Regina Coker are husband and wife who resided at Eastport, L.I., New York, at the time they filed their petition in this case. Their 1966 joint Federal income tax return was filed with the district director of internal revenue, Brooklyn, New York.

During 1966, petitioner was employed as the carpenter shop steward by Ase Carpentry Contractors, Inc. (Ase) at its Stony Brook, New York job site. He worked at this site a total of 261 days during 1966. In connection with this employment, petitioner was required to transport approximately 200 pounds of tools to and from the job site daily in his 1964 Oldsmobile which he used for this purpose. The distance between petitioner's home and job site was 31 miles and during the year in issue petitioner traveled a total of 16,182 miles in making this trip each work day.

Petitioner's duties as carpenter shop steward during 1966 included blowing the whistle to start and stop work, deciding when weather was unfit to work in, checking carpenters' union cards, keeping time records, procuring union cards where necessary from the district council office, keeping records of each carpenter's time for his welfare, pension and vacation benefits, checking the union's time records against the contractor's records, taking injured carpenters to the hospital, insuring that contractors observed the terms of the union contract, and doing carpentry work as time permitted. In the course of performing these duties petitioner contacted at least once and sometimes two or three times each day more than 80 carpenters

employed by Ase and other contractors at this job site. These men were spread over two large tracts, eight to ten miles apart, where between 500 and 600 single family dwellings were constructed in 1966. To reach these men petitioner had to travel over from ten to fifteen miles of roads which were for the most part unpaved. During the year in issue petitioner traveled at least sixty miles per day on the job site and its vicinity in his automobile carrying out his duties as carpenter shop steward. No reimbursement for these expenses was made to petitioner by his employer. A total of 15,660 miles was driven by petitioner in 1966 in the course of his work at the Stony Brook job site.

Despite the provision of storage facilities by Ase for carpenters to store their tools and the presence of armed guards during non-working hours to protect these facilities, none of the carpenters employed at Stony Brook used these storage areas because of the problems of theft and vandalism. Ase did use these facilities and some of its equipment was stolen or vandalized while stored in them.

Petitioner used his automobile to transport and store his tools during the year in issue because it was the most feasible and satisfactory method for making them available when and where necessary in accordance with the requirements of his employment. Petitioner also used his automobile to travel between his personal residence and job site because it was the only feasible and satisfactory mode of transportation available for this purpose. Alternative transportation would have been more costly and would have required travel on at least one train and transfers to two separate buses. Therefore, petitioner would have driven to work absent the necessity of transporting his tools.

Appendix A

OPINION

Petitioner contends that the expenses he incurred in driving between his personal residence and job site at Stony Brook, L.I., New York and the travel expenses he incurred in the performance of his duties as carpenter shop steward at the job site both constitute deductible business expenses under section 162(a). Respondent argues that petitioner's expenses of driving between his personal residence and job site are personal, non-deductible, commuting expenses under section 262.[2] Respondent further asserts that the deduction for travel expenses incurred by petitioner at his job site should not exceed $1,339.20 which amount respondent determined to be properly deductible in the statutory notice of deficiency mailed to petitioner in this case.

In focusing upon the issues in this case respondent urges that the factual situation before us does not fall within the limited exception to the general rule regarding the allocation of business and commuting expenses set down in *Sullivan* v. *Commissioner,* 368 F.2d 1007 (C.A. 2, 1966), reversing and remanding 45 T.C. 217 (1965), Memorandum Opinion of this Court on remand, affirmed per curiam in an unpublished order (C.A. 2, 1969, 24 A.F.T.R. 2d 69-5053, 69-2 U.S.T.C. ¶9448), certiorari denied 396 U.S. 827 (1969). Respondent argues that (a) petitioner would have driven his automobile to work absent the necessity of transporting his tools; (b) adequate storage facilities were provided for petitioner's tools at the job site at no cost to him; (c) petitioner's activities as shop steward left him virtually no time to perform carpentry work and thus made the transportation of his carpentry tools un-

2 See also sections 1.162-2(e) and 1.262-1(b)(5), Income Tax Regs., which provide that the cost of commuting to and from work is not deductible.

necessary; and (d) the use of petitioner's automobile for business purposes once at the job site does not transform petitioner's personal expense of commuting into a business expense.

Although our findings of fact would dictate that we deny petitioner any deduction whatsoever because he would have used his automobile to travel between his residence and job site regardless of the necessity of transporting his tools or using his automobile in connection with his duties once at the job site, *Robert A. Hitt,* 55 T.C. 628 (1971) and *Harold Gilberg,* 55 T.C. 611 (1971), since an appeal from the decision in this case lies with the Court of Appeals for the Second Judicial Circuit we must follow the rule of law applicable to this case in that Circuit. *Jack E. Golsen,* 54 T.C. 742 (1970), affirmed on another issue 445 F.2d 985 (C.A. 10, 1971). For that reason, and because we have found that petitioner was required to perform carpentry work for Ase, as time permitted, thus necessitating the presence of his carpentry tools at all times as well as the fact that storage facilities for petitioner's tools at the job site were inadequate, we are constrained to hold that some portion of petitioner's expenses in driving between his residence and job site are properly deductible. *Sullivan* v. *Commissioner, supra; Arnold T. Anderson,* 55 T.C. 756 (1971); and *Donald W. Fausner,* 55 T.C. 620 (1971).

Petitioner demands that we go one step further. He argues that since his automobile was used and was actually required in carrying out his duties as carpenter shop steward, it is just as much a tool of his trade as his carpentry tools and the cost of transporting it to and from the job site should be equally deductible. Assuming, without

deciding, that this position is correct[3] we are still required under the circumstances of this case to allocate the expenses incurred by petitioner between the cost of his own transportation and that of his tools. *Sullivan* v. *Commissioner, supra.*

Having concluded that petitioner is entitled to a partial deduction of his expenses incurred in traveling to work, we must now determine the precise amount of his deduction. As noted earlier, petitioner would have driven his automobile to work under any circumstances. He refused to present any evidence to the contrary. Petitioner also failed to offer any evidence with respect to alternative transportation or the cost thereof and strenuously objected to the introduction into evidence of any testimony or documents bearing on this subject by respondent. Since such alternative transportation was not available to petitioner as a practical alternative, however, it is our conclusion that it is not a pertinent yardstick in this case for determining petitioner's deductible costs in traveling to work. See *Anderson, supra,* limiting the application of such a formula to appropriate circumstances. Petitioner has failed to offer any evidence on the cost or availability of adequate storage facilities for his automobile at his job site during non-working hours. On this point he chose to rely solely on the fact that the

3 Thus far the Courts of Appeals that have considered this question have been unanimous in rejecting the notion that the cost of transporting one's personal automobile to the place where one works, even though that automobile is used in the course of that trade or business, is a deductible expense under section 162. *Steinhort* v. *Commissioner,* 335 F.2d 496 (C.A. 5, 1964); *Heuer* v. *Commissioner,* 283 F.2d 865 (C.A. 5, 1960), affirming per curiam 32 T.C. 947 (1959); and *Smith* v. *Warren,* 388 F.2d 671 (C.A. 9, 1968). See also *United States* v. *Tauferner,* 407 F.2d 243, 246-247 (C.A. 10, 1969); *Sanders* v. *Commissioner,* 439 F.2d 296 (C.A. 9, 1971); *Clarence J. Sapp,* 36 T.C. 852 (1961), affirmed per curiam 309 F.2d 143 (C.A. 5, 1962) and *James M. O'Hare,* 54 T.C. 874 (1970).

tool sheds provided by Ase for tool storage were inadequate to house anything as large as an automobile. No further testimony regarding the cost or nonexistence of private storage facilities nearby was offered by petitioner. With these factors in mind as well as the fact that petitioner would not have utilized any available storage facility because he needed his automobile to transport himself to work daily, we must determine the amount of his travel expense that is properly deductible. Without purporting to set forth any standard for allocating the total cost between the personal commuting element and that element attributable to carrying his tools, *Fausner, supra,* and bearing heavily against petitioner because the inexactitude is of his making, *Cohan* v. *Commissioner,* 39 F.2d 540 (C.A. 2, 1930), we find that 33 1/3 percent of the costs of driving from petitioner's personal residence to his job site in 1966 is properly deductible. We also hold, in accordance with our findings of fact set out above, that petitioner is entitled to deduct the costs of traveling 15,660 miles in the course of his work at the Stony Brook job site, reduced by the amount of $1,339.20 previously allowed by respondent in this case.

Finally we hold that petitioner's contention that respondent "elected to work without the statutory formula set out in section 63 and that statutory formula is not now available to respondent" is totally without merit. Petitioner cites no statutory or judicial authority in support of this position and in fact, none exists. Petitioner would require that in every case where respondent challenges the propriety of a deduction, should the taxpayer be sustained, that taxpayer's tax liability for the year in issue would be extinguished. Such a rule would be patently absurd.

Reviewed and adopted as the Report of the Small Tax Case Division.

Decision will be entered under Rule 50.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 634/825—September Term, 1972.

(Argued April 16, 1973 Decided May 14, 1973.)

Docket No. 72-2309/73-1011

FRANK W. COKER and REGINA COKER,

Petitioners-Appellants and Cross-Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee and Cross-Appellant.

On Appeals from the decision of the United States Tax Court.

Affirmed.

B e f o r e:

CLARK, *Associate Justice,**
WATERMAN and FEINBERG, *Circuit Judges.*

THOMAS J. CARLEY, 159 Princeton Road, Rockville Centre, New York, *for Petitioners-Appellants and Cross-Appellees.*

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* Associate Justice of the United States Supreme Court (Retired), sitting by designation.

Appendix B

SCOTT P. CRAMPTON, Assistant Attorney General Meyer Rothwacks, Thomas L. Stapleton, David English Carmack, Attorneys, Tax Division, Department of Justice, Washington, D.C., *for Respondent-Appellee and Cross-Appellant.*

PER CURIAM:

This case involves a claimed deficiency in Mr. and Mrs. Frank Coker's joint federal income tax for the calendar year 1966 occasioned by their deduction of Mr. Coker's commuting expenses to and from his job site. Appellant Coker (husband) was a carpenter shop steward who performed carpentry work on the job site as time permitted. His duties necessitated the ready availability of his carpenter tools, and he therefore always carried an assortment of tools weighing some 200 lbs. with him in the 1964 Oldsmobile he used for commuting. In addition to the commuting to and from work, appellant also travelled some sixty miles a day in performing his duties on the job sites to which he was assigned; this expense was allowed as a deduction and is not involved here.

The Commission disallowed in its entirety appellant's claimed deduction for the expense of commuting to and from work. The Tax Court, considering itself bound by *Sullivan* v. *Commissioner*, 368 F.2d 1007 (2 Cir. 1966), allowed appellant to deduct what it considered a reasonable percentage of this commuting expense allocable to the transportation of his tools. Both the Cokers and the Commissioner appealed, the former insisting that all Mr. Coker's commuting expenses should have been allowed as deductions, while the Commissioner urges this Court to overrule *Sullivan, supra,* and deny the Cokers any deduction. We reject both arguments and therefore affirm.

Appendix B

Since the enactment of the Income Tax Act of 1913, commuting expenses have been considered non-deductible personal expenses. *Commissioner* v. *Flowers*, 326 U.S. 465, 469 (1946). In fact this rule has clearly been accepted by Congress. See H. Rep. No. 1337, 83d Cong., 2d Sess., p. A19 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4156); S. Rep. No. 1622, 83d Cong., 2d Sess. p. 169 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4803-4804). Coker seeks to escape this Congressional rule by claiming that his expenses were necessarily incurred in his effort to earn a living. But the same can be said of every taxpayer's expense in going to and from work. Furthermore, expenditures for food, clothing, and shelter are also necessary to enable one to earn a living. The fact is that Congress has directed that such expenses not be deductible. Appellant's argument that allowance of the deduction he claims is compelled by the Sixteenth Amendment does not merit discussion.

Nor are we persuaded by the Commissioner's argument that the primary purpose test should be applied. Taxpayer is entitled to some allowance for transporting the 200 lb. of tools under the peculiar circumstances here. *Sullivan* v. *Commissioner, supra. Sullivan* has been followed in this Circuit for some seven years. Any change in the rule should come from the Congress or the Supreme Court.

Affirmed.

Appendix C

SUPREME COURT OF THE UNITED STATES

No. A-154

FRANK W. COKER and REGINA COKER,
Petitioners,

— against —

COMMISSIONER OF INTERNAL REVENUE
Respondent.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 11, 1973.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 31st
day of July, 1973.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

FRANK W. COKER AND REGINA COKER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-636

FRANK W. COKER AND REGINA COKER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. Petitioner[1] is a carpenter shop steward who, during the year in question, regularly used his private automobile to transport himself from his home to his principal place of employment and back again, a round-trip distance of approximately 62 miles. In connection with his employment, he transported each work day approximately 200 pounds of tools. He also used his automobile in connection with his work. Relying principally on the fact that the circumstances of his job required him to carry his tools to and from work, petitioner deducted on his 1966 income tax return as ordinary and necessary business expenses under Section 162(a) of the Internal Revenue Code of

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[1]References to petitioner are to Frank W. Coker. Regina Coker is a party only because joint income tax returns were filed for the year in issue.

1954, the entire cost of driving his automobile to and from work. On audit, the Commissioner of Internal Revenue disallowed the deduction (Pet. App. B 17).

The Tax Court viewed the expenses at issue as non-deductible commuting costs because petitioner would have used his automobile to commute to work even if he were not required to carry his tools. Nevertheless, the Tax Court did not uphold the Commissioner's disallowance in its entirety because of the Second Circuit's decision in *Sullivan* v. *Commissioner,* 368 F. 2d 1007, after remand, 69-2 U.S.T.C., par. 9448, certiorari denied, 396 U.S. 827. That case had held if a taxpayer is required to carry work implements, a portion of his commuting expenses are deductible as ordinary and necessary business expenses even though the taxpayer fails to prove that he thereby incurred additional costs above commuting costs. Since petitioner's appeal was to the Second Circuit, the Tax Court followed the rule in *Sullivan,*[2] and allowed petitioner a deduction of one-third of his commuting costs even though he had failed to show that he incurred additional expenses to transport his tools (Pet. App. A 9-15). On cross appeals, the court of appeals affirmed (Pet. App. B 16-18).

After affirmance by the court of appeals, this Court announced its decision in *Fausner* v. *Commissioner,* No. 72-1396, decided June 25, 1973, rehearing denied, October 9, 1973, which resolved the conflict of decisions which had developed concerning the deductibility of the cost of transporting tools. In *Fausner,* the Court overruled the Second Circuit's decision in *Sullivan,* and held that a

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[2]Under the rule announced in *Golsen* v. *Commissioner,* 54 T.C. 742, affirmed on other grounds, 445 F. 2d 985 (C.A. 10), certiorari denied, 404 U.S. 940, the Tax Court will follow the decision of the circuit to which an appeal would be taken.

taxpayer cannot deduct his transportation expenses between his home and work even if he carries incidentals of his occupation with him, unless he can demonstrate that he incurred additional costs above his usual commuting expenses.

On July 11, and August 1, 1973, the court of appeals granted motions by both the Commissioner and petitioner to file untimely petitions for rehearing in light of this Court's *Fausner* decision. On October 17, 1973, the court of appeals denied petitioner's petition for rehearing, granted the Commissioner's petition, and reversed the Tax Court's decision insofar as it permitted petitioner to deduct part of his commuting expenses. The court of appeals noted that *Sullivan* had been overruled by *Fausner* and that petitioner had "presented no evidence to the Tax Court remotely suggesting that any additional expense was incurred because of the necessity of transporting * * * [his] tools" (Appendix, *infra*, p. 8).

2. Despite this Court's definitive ruling in *Fausner* that the expenses of transporting tools are not deductible commuting expenses unless there is evidence of additional expenses attributable only on account of the tools, petitioner urges (Pet. 5) that deduction of all commuting expenses is constitutionally mandated. Petitioner claims that to hold otherwise would permit a tax upon gross receipts rather than upon income, contrary to the Sixteenth Amendment. He further argues that Section 262 of the Code, which forecloses a deduction for personal expenses, is unconstitutionally vague.

In the sense in which petitioner uses the term "gross receipts," however, it is the same as gross income which this Court has held is subject to the taxing power. In *New Colonial Co.* v. *Helvering*, 292 U.S. 435, 440, the Court said:

> The power to tax income * * * is plain and extends to * * * gross income. Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.

See also *McDonald* v. *Commissioner,* 323 U.S. 57, 59. Since Congress has not provided a deduction for commuting expenses,[3] the decision below correctly upheld the Commissioner's disallowance of the claimed deduction.[4]

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[3]When the Internal Revenue Code of 1954 was enacted, Congress recognized that the expense incurred in commuting to and from work "constitute[d] a personal living expense and * * * [was] never deductible." H. Rep. No. 1337, 83d Cong., 2d Sess., p. A 19; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 169.

Indeed, since the enactment of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166, commuting expenses have been considered nondeductible personal expenses. See S. 1048, 1 Cum. Bull. 101; Art. 101(a) of Treasury Regulations 62 (1921 Revenue Act); Art. 102 of Treasury Regulations 65 (1924 Revenue Act); Art. 102 of Treasury Regulations 69 (1926 Revenue Act); Art. 122 of Treasury Regulations 74 and 75 (1928 Revenue Act); Art. 122 of Treasury Regulations 77 (1932 Revenue Act); Art. 23(a)-2(c) of Treasury Regulations 86 (1934 Revenue Act); Art. 23(a)-2(c) of Treasury Regulations 94 (1936 Revenue Act); Art. 23(a)-2(c) of Treasury Regulations 101 (1938 Revenue Act); Sec. 19.23(a)-2(c) of Treasury Regulations 103 (1939 Code); Secs. 29.23(a)-2(c) and 29.23(a)-15(b) of Treasury Regulations 111 (1939 Code); Secs. 39.23(a)-2(i) and 39.23(a)-15(f) of Treasury Regulations 118 (1939 Code); Secs. 1.62-1(g), 1.162-2(e), 1.212-1(f), and 1.262-1(b)(5) of the Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.). See also *Sullivan* v. *Commissioner,* 1 B.T.A. 93.

[4]Petitioner's further contention that his commuting expenses are "acquisitive" and not personal in character is equally without merit. Indeed, the very case upon which he relies for the proposition that acquisitive expenses are deductible recognizes that commuting expenses do not fall into that category. *Primuth* v. *Commissioner,* 54 T.C. 374, 381.

3. Equally without merit is petitioner's claim (Pet. 7-8) that unless this Court grants review in this case, each taxpayer must take "pot luck," depending upon the circuit to which his appeal lies. This Court in *Fausner* not only overruled the Second Circuit's decision in *Sullivan,* but also rejected the Seventh Circuit's similar decision in *Tyne* v. *Commissioner,* 385 F. 2d 40, after remand, 409 F. 2d 485, certiorari denied, 396 U.S. 833, on remand, 29 T.C.M. 1398, affirmed, 468 F. 2d 913. Moreover, the other courts of appeals will follow this Court's *Fausner* decision.[5]

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

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[5]Nothing in *Crowther* v. *Commissioner,* 269 F. 2d 292 (C.A. 9) supports petitioner's argument (Pet. 7). There, the only issue was the deductibility of transportation expenses to temporary work sites. In any event, it would appear that the Ninth Circuit has at the very least strictly limited *Crowther* to its facts, and possibly has overruled it. See, *e.g., Sanders* v. *Commissioner,* 439 F. 2d 296, certiorari denied, 404 U.S. 864.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 634/825—September Term, 1972.
(Decided October 17, 1973.)
Docket Nos. 72-2309/73-1011

FRANK W. COKER AND REGINA COKER,
Petitioners-Appellants and Cross-Appellees,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee and Cross-Appellant.

Before:
CLARK *Associate Justice,** WATERMAN AND FEINBERG,
Circuit Judges.

Rehearing of appeal from decision of United States Tax Court permitting deduction of part of commuting expenses because husband-taxpayer was required to carry his tools with him.

Reversed in part.

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*Associate Justice of the United States Supreme Court (Retired) sitting by designation.

On Petition for Rehearing

PER CURIAM:

On May 14 of this year, we affirmed a decision of the United States Tax Court, CCH Tax Ct. Mem. 1972-80, permitting appellant taxpayers to deduct one-third of the expense incurred by Mr. Coker in commuting by car to and from his job as a carpenter and shop steward at a construction site.[1] This deduction was held to be proper because Mr. Coker was required to carry his carpentry tools with him each day when driving between his home and the job site, and under this court's decision in *Sullivan* v. *Commissioner*, 368 F. 2d 1007 (1966), a taxpayer may deduct from his commuting expenses an appropriate percentage allocable to the transportation of his tools.

On June 25, however, the Supreme Court affirmed a contrary decision of the Fifth Circuit and thereby resolved a conflict among the circuits on this issue[2] by holding that commuting expenses are not deductible merely "because by happenstance the taxpayer must carry incidentals of his occupation with him." *Fausner* v. *Commissioner*, 41 U.S.L.W. 3670 (U.S. June 25, 1973) (per curiam). The Court did leave open the possibility that an appropriate amount may be deducted if "additional expenses" are "incurred for transporting job-required tools and material to and from work." (Footnote omitted.)

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[1]We also rejected the Cokers' appeals from the Tax Court, in which they contended that they should be permitted to deduct all commuting expenses, rather than just one-third. The Cokers have petitioned for rehearing of that portion of the opinion denying their claim. We adhere to our prior holding on this point.

[2]Compare *Fausner* v. *Commissioner*, 472 F. 2d 561 (5th Cir. 1972), with *Sullivan* v. *Commissioner*, 368 F. 2d 1007 (2d Cir. 1966), and *Tyne* v. *Commissioner*, 385 F. 2d 40 (7th Cir. 1967), after remand, 409 F. 2d 485 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969).

In view of the intervening decision in *Fausner*, we grant the Government's petition for a rehearing and reverse the decision of the Tax Court insofar as it permits the Cokers to deduct part of Mr. Coker's commuting expenses. *Fausner* clearly overrules *Sullivan*, and holds that none of the commuting costs are deductible when, as in this case, the taxpayer would have used his automobile in any event. In addition, the Cokers presented no evidence to the Tax Court remotely suggesting that any additional expense was incurred because of the necessity of transporting Mr. Coker's tools.

The judgment is modified in accordance with this opinion.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-636

FRANK W. COKER and REGINA COKER

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONERS

THOMAS J. CARLEY
159 Princeton Road
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IN THE

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No. 73-636

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REPLY BRIEF FOR THE PETITIONERS

After this Court acquired jurisdiction of this case on October 11, 1973, on filing of this Petition for Certiorari, a meeting was held in the Washington, D.C. chambers of Hon. Howard A. Dawson, Jr., Chief Judge of the U.S. Tax Court. The meeting had been called by Judge Dawson and was attended by Judge Dawson, Charles S. Casazza, Esq. (Clerk of the Tax Court), Robert A. Bridges, Esq. (National Director of Tax Court litigation division of the Treasury Department), and Steedly Young, Esq. of the New York Regional Counsel's office for the government — and the undersigned Thomas J. Carley for the people. As a result of this meeting the following was determined:

1. Judge Dawson (and all the other Tax Court judges) are thoroughly confused by this Court's June 25, 1973 decision in *Fausner* v. *Commissioner,* No. 72-1396. There is some irony in this because Judge Dawson was the trial judge in the *Fausner* Tax Court trial — now Judge Dawson does not understand how he could have found as a fact that Fausner's expenses could simultaneously fall into both the necessary and unnecessary categories.

2. The Treasury Department trial attorneys of the nation are thoroughly confused by the *Fausner* decision. In the New York Regional Counsel's office alone, it was stated that there are no less than 20 differing opinions or guesses on what the *Fausner* decision means or what was possibly intended to have been meant or not meant.

3. There are not less than 380 docketed cases awaiting trial in the Tax Court raising precisely the identical Constitutional issues presented in this Petition for Certiorari by Coker. Instead of trying all these cases, it was agreed by Chief Judge Dawson for the Tax Court and by the Treasury Department representatives present that all 380 cases awaiting trial would be continued generally in the hope and prayer that the Supreme Court would grant certiorari in this Coker case, receive briefs, permit oral argument and write a definitive opinion on all the Constitutional questions here presented by Coker.

Also since this Court acquired jurisdiction of this case on October 11, 1973, there is yet another case before the United States Court of Appeals for the Second Circuit. In *DeMichele* v. *Commissioner of Internal Revenue,* C.A. 2, Docket No. 73-2299, the Commissioner is contending that 71% of DeMichele's commuting costs are deductible and DeMichele is contending for the extra 29%. How, in

the name of common sense, can the Second Circuit decide the *DeMichele* case without guidance from this Court on all the Constitutional questions presented on this *Coker* Petition for Certiorari? Even if all of DeMichele's constitutional and statutory rights are discarded, the worst that can come out of the *DeMichele* case is a holding that 71% of DeMichele's commuting expenses are deductible.

A week after the Second Circuit lost jurisdiction of this *Coker* case to the Supreme Court, the Second Circuit allegedly entered another opinion in this Coker case on October 17, 1973 (Comm. Memo 6-8) equating the *"happenstance"* theory of *Fausner* with Coker's *"necessity"* of bringing his 1964 Oldsmobile and tools to work in order to be able to do the extensive on-the-job traveling and work required of Coker. Aside from the lack-of-jurisdiction problem, how is the Second Circuit to write a sensible opinion in the *DeMichele* case where the Commissioner has already conceded that 71% of commuting expenses are deductible?

Coker is petitioning for a writ of certiorari to review the judgment of the Second Circuit entered on May 14, 1973. Even the Commissioner agrees that the May 14, 1973 judgment is erroneous, but nevertheless urges this Court to deny certiorari, and permit the mere allowance of 71.811239% of Coker's ordinary and necessary business expenses to stand as an affront to common sense and the United States Constitution.

Frank Coker's 1966 trade or business gross receipts amount to	$11,291.35
Frank Coker's 1966 ordinary and necessary business expenses of commuting and travel on the job in getting the above stated trade or business gross receipts amounted to	2,678.94

Frank Coker's 1966 trade or business *"INCOME"* was precisely $ 8,612.41

The Sixteenth Amendment to the Constitution of the United States grants Congress only the power to lay and collect taxes on Frank Coker's $8,612.41 "INCOME".

Section 162(a) of the Internal Revenue Code provides that "ALL" of Frank Coker's $2,678.94 ordinary and necessary expenses of commuting and travel on the job "SHALL" be allowed as a deduction from Frank Coker's $11,291.35 trade or business receipts.

A generation ago the Second Circuit instructed that our American scheme of "INCOME" taxation provides that from Frank Coker's $11,291.35 receipts, it is necessary to take all Frank Coker's $2,678.94 ordinary and necessary expenses incurred in getting the $11,291.35 in order to reduce the $11,291.35 receipts down to what is in fact Frank Coker's true "INCOME" of $8,612.41 and so lawfully taxable as such. *Davis* v. *U.S.*, 87 F.2d 323, 324, 325 (CCA 2d, 1937), cert. denied 301 U.S. 704, 81 L. Ed. 1359, 57 S. Ct. 937 (1937).

Measured against every honorable American standard of Constitutional law, the Commissioner may tax only Frank Coker's "INCOME" of $8,612.41 and not one cent more.

The Commissioner's attempt to tax Frank Coker's "INCOME" *plus* an extra $1,132.74 is clearly not based on our American Constitutional scheme of "INCOME" taxation.

Since the adoption of the 16th Amendment to the Constitution in 1913 and the enactment of the Income Tax Act of 1913, no definitive ruling has been made by the Supreme Court on the Constitutional questions here presented.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for oral argument.

Respectfully submitted,

THOMAS J. CARLEY
159 Princeton Road
Rockville Centre, N.Y. 11570
Attorney for Petitioners

December, 1973.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-636

FRANK W. COKER and REGINA COKER

Petitioners,

— against —

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

THOMAS J. CARLEY
159 Princeton Road
Rockville Centre, N.Y. 11570
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IN THE

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October Term, 1973

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FRANK W. COKER and REGINA COKER

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COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR REHEARING

To the Honorable Justices of the Supreme Court of the United States:

Petitioners Frank W. Coker and Regina Coker present this petition for a rehearing in the above entitled case and, in support thereof, respectfully show the following.

The Court's Action Herein

On January 7, 1974 this Court denied the petition for a writ of certiorari in the above-entitled case.

Reasons for Granting a Rehearing

The rehearing petitioned for should be granted for the following reasons:

This Court's Recent Decision in Fausner Is Under Attack on Every Front.

On January 10, 1974 the Court of Appeals for the Second Circuit affirmed without opinion a Tax Court decision in *DeMichele* v. *Commissioner of Internal Revenue* that 71% of DeMichele's commuting expenses are deductible and 29% not deductible. The Tax Court opinion is reported at T.C. Memo 1973-115; Para. 73, 115 P-H Memo T.C. The Second Circuit Docket No. is 73-2299.

Upon the DeMichele oral argument, the Second Circuit judges specifically inquired about the Supreme Court actions in both *Fausner* v. *Commissioner,* 41 U.S.L.W. 3670 (Sup. Ct., June 25, 1973) and this instant *Coker* case. The Second Circuit judges were informed of the recent denial of the instant *Coker* petition for certiorari. During the discussion of this *Coker* case it was suggested that a petition for rehearing be filed with the Supreme Court to request the Supreme Court to hear the case and issue guidance on the constitutional questions presented by Coker.

During an exhaustive discussion of the *Fausner* case at the Second Circuit the uncontroverted analysis of the *Fausner* case was that the Supreme Court was misled as to the facts in *Fausner*. The Supreme Court was handed an impossible set of facts to work with. The Supreme Court was told that it was a necessity for Fausner to transport 2 bags (a forty pound flight-kit bag and a twenty

pound overnight bag) when driving to and from each flight assignment. The Supreme Court was also told that Fausner would have driven to work even if it had not been necessary to transport the 2 bags.

The problem with these Fausner "facts" is that they cannot co-exist. They are mutually exclusive and irreconcilable. "Necessity" of transporting Fausner's 2 bags cannot simultaneously exist with "non-necessity" of transporting Fausner's 2 bags. If in fact it was necessary for Fausner to transport the 2 bags in order to perform his duties on a flight assignment, it has to be clear to all rational persons that he would not go to work without the bags for the simple reason that he could not perform his duties on the flight assignment without his flight kit and/or other bag. If, on the other hand, he could have performed his flight assignment duties without the bags, that would merely show that the bags were not necessary to perform his duties. Take your pick. Fausner's claimed transportation expenses were either necessary or unnecessary—but they cannot fall simultaneously into both the necessary and unnecessary categories.

Fausner was a *pro-se* Tax Court case and Fausner established the law-of-the-case as it affected him by agreeing that, as to his case, commuting expenses are nondeductible under Section 262 of the Internal Revenue Code as personal expenses. Fausner then attempted to avoid his own law-of-the-case on the theory that his automobile expenses were incurred to transport his flight bag and overnight bag—as distinguished from transporting himself. This conflicting set of "facts" and law-of-the-case was then presented to the Supreme Court on behalf of Fausner for solution. The Supreme Court took the case *without briefs or oral argument* and determined there was no solution to the submitted "facts" and law-of-the-case.

The *Fausner* case now also has the judges of the United States Court of Appeals for the Second Circuit confused to the point where the Second Circuit judges cannot write an opinion on a simple case involving ordinary commuting expenses. The Commissioner is confused because he claims 71% of DeMichele's commuting expenses are deductible and that "a portion" (29%) is nondeductible.

The DeMichele oral argument was most detailed and exhaustive. It was there also shown, backed up by detailed analysis on brief, and *uncontroverted by the Commissioner in any fashion* that

1. There is no Treasury Regulation whatsoever that says commuting expenses claimed under Section 162(a) of the Internal Revenue Code are not deductible.

2. Section 262 is unconstitutionally vague and indefinite.

3. There is no Internal Revenue Code provision that says the expenses of going to and from work are not deductible and *neither does Congress have the authority under the Constitution to enact such a statute.*

The Solicitor General Has Misled This Court.

The Solicitor General in his Memorandum For The Respondent In Opposition on this *Coker* petition for a writ of certiorari has misled this Court in a number of instances.

On pages 1 and 2 of his Memorandum, the Solicitor General misled this Court by indicating that Coker was relying principally on the fact that Coker transported tools to and from work. This of course is just not true.

Coker is relying on the uncontroverted facts that all his expenses of driving to, from and on the job were necessarily incurred in earning $11,291.35 in 1966. Coker would not have driven his automobile to work without his carpenter tools or his automobile because the tools *and* the automobile were the implements physically required to be at the job site in order for Coker to perform his work. Coker is not Fausner. Coker will not enter into a collusive agreement with the Solicitor General to inflict a fraudulent set of facts upon this Court. Coker is quite happy with the evidence in this case. Neither has the Solicitor General explained how it could even be theoretically possible that Coker could be required to bring his automobile to work to perform his duties and simultaneously *not* be required to bring his automobile to work to perform his duties. The Solicitor General is selling confusion. Coker is propounding the Constitution and United States statutes.

Coker is not trying to avoid any commuting rule. Coker, in fact, has shown in the Courts below that *there is no commuting rule under our statutes and constitution.* Our research and analysis is so complete that the Commissioner is unable to answer it on brief and the Courts below are unable to write opinions showing any error whatsoever in any part of our research and argument.

Because our research is so complete we are able to report that the Solicitor General misled this Court on page 4 of his Memorandum, fn. 3 by not informing this Court that his cited "S. 1048, 1 Cum. Bull. 101" was declared obsolete in Rev. Rul. 69-31, Cum. Bull. 1969-1, pg. 307. Neither did he inform this Court that the obsolete "S. 1048" was built on the foundation of a Victorian

statute (Act 16 and 17 Victoria, c. 34) and was not based on American Statutory or constitutional law. The so-called "commuting rule" is BRITISH. It is not AMERICAN.

We have previously pointed out that none of the treasury regulations cited by the Solicitor General in his fn. 3 says that commuting expenses claimed under Section 162(a) of the Internal Revenue Code are not deductible.

So also the Solicitor General misled this Court in his fn. 3 by failing to inform this Court that *Sullivan* v. *Commissioner,* 1 B.T.A. 93 was a 1924 decision by the Board of Tax Appeals, which decision was not final under the Revenue Act of 1924 (43 Stat. 253, 336) which created the Board; neither was this 1924 *Sullivan* executive decision appealable to the Courts. It was not until enactment of the Revenue Act of 1926 that decisions of the Board became appealable to the Courts and final unless appealed (44 Stat. 9, 109). This 1924 *Sullivan* executive decision was also built on the foundation of the same Victorian statute (Act 16 and 17 Victoria, c. 34), as is obvious by reading the British cases cited therein.*

It is Imperative that the Court Grant the Prayed-For Writ of Certiorari

The question presented in this case must be clarified. Everything is now in complete disarray because of what Fausner and the Solicitor General did to this Court. The

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* We are informed by the librarians of the Supreme Court that the British cases cited in the 1924 *Sullivan* decision are not owned by or in the Supreme Court library. Neither does the Second Circuit Court of Appeals library have any of the British or Scottish cases cited on page 5 of the instant petition for a writ of certiorari. Inasmuch as these cases must be read for a full understanding of the errors in this case, it may facilitate matters if the librarian were requested to obtain them for the Court.

Fausner decision has all of the Tax Court judges and Treasury trial lawyers confused and stymied. Now it is certified that the Second Circuit Court of Appeals judges cannot understand and live with the Fausner decision.

The undersigned attorney has done more research in this area of law than any other attorney in this nation in this century.

Upon certiorari being granted, the undersigned attorney will present on brief a comprehensive survey and analysis of this entire area of law so as to permit this Court to write a complete and definitive opinion on this subject and case.

CONCLUSION

The petition for rehearing, as well as the petition for a writ of certiorari, should be granted and the case set for oral argument.

Respectfully submitted,

THOMAS J. CARLEY
159 Princeton Road
Rockville Centre, N.Y. 11570
Attorney for Petitioners

January, 1974.

Certificate of Counsel

I, THOMAS J. CARLEY, attorney for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds above specified.

THOMAS J. CARLEY
Attorney for Petitioners